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Max Hayden – April 13, 2022

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 CASE NO. 18-MD-2865 (LAK)

4 IN RE:

5 CUSTOMS AND TAX ADMINISTRATION OF
6 THE KINGDOM OF DENMARK
7 (SKATTEFORVALTNINGEN) TAX REFUND
8 SCHEME LITIGATION

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11
12
13 C O N F I D E N T I A L

14
15
16 REMOTE VTC VIDEOTAPED EXPERT DEPOSITION UNDER
17 ORAL EXAMINATION OF
18 MAX HAYDEN

19
20 DATE: April 13, 2022

21
22
23
24
25 REPORTED BY: MICHAEL FRIEDMAN, CCR

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1 THE VIDEOGRAPHER: Stand by.

2 The time is 7:09 a.m. New York

3 time, and we are back on record.

4

5 M A X H A Y D E N,

6 called as an expert witness, having been

7 first duly sworn according to law, testifies as

8 follows:

9

10

11

12 EXAMINATION BY MR. OXFORD:

13 Q All right. Good morning,

14 Mr. Hayden.

15 My name again, Neil Oxford. I'm

16 going to be asking you some questions today.

17 I represent the plaintiff SKAT in

18 this matter.

19 Can you tell me, please, whether

20 you've testified previously in any capacity?

21 A No, I haven't.

22 Q Okay, fine.

23 MR. PRUDEN: Yeah, we're having a

24 little trouble getting his audio

25 calibrated. Let's go off again for a

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1 doing for MPT Dubai was broker and custodian.
2 I'm not aware that ED&F was also providing
3 anything associated with compliance or
4 surveillance or anything of that nature that
5 would have ensued; that they looked at the
6 activities of MPT Dubai to judge whether
7 those trades were as they needed to be.

8 That would very much be the
9 responsibility of MPT Dubai.

10 I'm not familiar with situations
11 where custodians will review their clients'
12 activity when they're essentially only being
13 employed to settle business to make sure that
14 the -- to make sure their clients are trading
15 in a particular way.

16 Q Going back to the question, sir, of
17 the differences, if any, between the Annex E
18 trades and the non-Annex E cum-ex trades.

19 You told me that they were
20 different because the seller in the Annex E
21 trades was MPT Dubai and the client of
22 ED&F Man.

23 In the work that you did on this
24 case, did you observe any other differences
25 in the Annex E trades and the non-Annex E

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1 cum-ex trades?

2 MR. PRUDEN: Objection.

3 A I've reviewed trades, which are
4 Annex E, non-Annex E, and also Appendix F.

5 And because these trades are
6 collectively driven by the strategy around
7 dividend arbitrage, is -- there's numbers of
8 similarities across them all, and it's a fact
9 that there would be hedged transactions.
10 We've seen some futures. There are
11 potentially short-cycle trades, et cetera, et
12 cetera.

13 So I have seen many similarities
14 across the whole list of trades that I have
15 seen, but I would say that fundamental point
16 that the Annex E trades are quite unique to
17 the degree that, as I said before, MPT Dubai
18 employed ED&F as its custodian as well.

19 In the other -- in the non-Annex E
20 trades, an example, that is not the case, and
21 I'm not aware of any of the other
22 counter-parties that ED&F used to trade
23 through on behalf of their clients and
24 counter-parties that they supplied similar
25 services to.

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1 Q Okay. Other than the fact that
2 MPT Dubai was a client of ED&F Man, did you,
3 in all the work you did on this case, sir,
4 observe any other differences between the
5 Annex E trades and the non-Annex E cum-ex
6 trades?

7 MR. PRUDEN: Objection. Asked and
8 answered.

9 A As I said, I've reviewed an awful
10 lot of trades from a mixture of Appendix F,
11 and there are enormous similarities to purely
12 isolate one group, is -- I don't think
13 appropriate in context of the dividend
14 arbitrage business that was being conducted
15 here.

16 Q So that's just yes or no. Are you
17 aware of any other differences -- yes or no,
18 sir -- between the Annex E trades and the
19 non-Annex E cum-ex trades other than the fact
20 that MPT Dubai on the Annex E trades was a
21 client of ED&F Man?

22 MR. PRUDEN: Objection.

23 A I think the main difference is that
24 ED&F were executing these transactions with a
25 range of IDBs. Some of them may have traded

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1 through against MPT Dubai, but we can see,
2 because of the activity that went through
3 MPT Dubai, that many of them went elsewhere.

4 So I do know that back-to-back flow
5 of business would have gone to other -- gone
6 elsewhere to other counter-parties that we
7 don't know.

8 Q Okay. So, again, other than the
9 fact that MPT Dubai was the counter-party in
10 the Annex E trades and MPT Dubai was a client
11 of ED&F Man, did you, in all the work you did
12 on this case, identify any other differences
13 between the Annex E and non-Annex E cum-ex
14 trades?

15 MR. PRUDEN: Objection.

16 A There could have been differences
17 of securities that were traded. There could
18 be differences on prices that were traded. I
19 would have to look at specific trades.

20 Q I'm not asking you to speculate,
21 sir. I'm not asking you to say "could," I'm
22 asking you whether, in all the work you did
23 on this case, you observed any other
24 differences between the Annex E and
25 non-Annex E cum-ex trades.

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1 MR. PRUDEN: Objection.

2 Q Just give me a list --

3 MR. PRUDEN: Objection.

4 Q -- if you have one.

5 A And differences -- sorry.

6 Differences to the extent that the
7 trades were structured slightly different, or
8 is it purely down to the fact that MPT Dubai
9 was employing ED&F as a custodian and broker?
10 But for the non-Annex E trades, you're saying
11 that the other counter-parties were not, and
12 so, therefore, that is the only difference,
13 specific difference that I can see.

14 Is that the playback of your
15 question?

16 Q I'm not testifying, sir. I'm
17 trying to get you to tell me what your
18 opinion is, if you have one, on the
19 differences between Annex E and non-Annex E
20 cum-ex trades.

21 MR. PRUDEN: Objection.

22 Is that a question are you
23 re-asking the same question, or do you
24 want to put it another way?

25 MR. OXFORD: That's a question.

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1 Q What are the differences between --
2 that you observed, if any, between the
3 Annex E and non-Annex E cum-ex trades?

4 A As I said, the key difference is
5 the fact that MPT Dubai was identified as
6 being party to the trades on Annex E. That
7 is the key difference.

8 And to that end, that's only come
9 about because of a subsequent discovery by
10 ED&F who, while providing custody and
11 brokerage services to MPT Dubai, can see that
12 they -- for a subset of transactions, they
13 were party to those trades and they did not
14 cover their sales.

15 And that is the difference, as I
16 see it, between Annex E and non-Annex E and
17 is very key to this.

18 Q I'm going to ask you to make
19 another assumption, sir.

20 Are you ready?

21 A Okay.

22 Q I'm going to ask you to assume that
23 the ultimate counter-party in the non-Annex E
24 cum-ex trades also did not cover their short
25 sales until after the ex date.

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1 market maker.

2 Do you have any reason to disagree
3 with that?

4 MR. PRUDEN: Objection.

5 A I haven't looked up MUFG's licenses
6 and permissions, so I couldn't really comment
7 on that.

8 But if that's something that
9 Mr. Wade has proven in his citations, then I
10 have no reason to deny it.

11 Q Can you agree, just leaving
12 Mitsubishi aside for a moment, that if it
13 were to be established that a non-Annex E
14 cum-ex seller was subject to U.K. corporation
15 tax on its profits, it would have been
16 entitled to a partial refund of 12 percent on
17 any Danish dividends received?

18 MR. PRUDEN: Objection.

19 A Again, as part of my analysis, I
20 haven't gone specifically through the tax
21 treaty that Denmark has with other countries,
22 so I couldn't tell you verbatim if that was
23 accurate in all cases.

24 So I can't really comment on that
25 based on the analysis that I have done to

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1 Q In forming your opinions, sir, did
2 you consider the impact of the Danish
3 corporate tax act?

4 MR. PRUDEN: Objection.

5 A I'm not familiar with that act.

6 Q Are you aware that under Danish
7 law, entities that are resident in E.U.
8 member states, including France, for example,
9 that have incorporated council directive 2011
10 16 EU can receive 85 percent of the gross
11 dividend on Danish shares rather than
12 73 percent?

13 MR. PRUDEN: Objection.

14 A I'm not aware of that particular
15 act.

16 Q Can you agree that in -- an
17 important factor to consider in analyzing
18 these trades is what the tax treatment of the
19 sellers in the cum-ex non-Annex E trades
20 would be if they simply decided to hold their
21 position?

22 MR. PRUDEN: Objection.

23 A For the -- for these types of
24 transactions, which are obviously driven by
25 dividend, then it would make sense to

Errata Sheet

Caption: *In re Customs & Tax Administration of the Kingdom of Denmark (Skatteforvaltningen) Tax Refund Litigation, Master Docket No. 18-md-2865 (LAK)*

Witness: **Max F. Hayden**

Deposition Date: **April 13, 2022**

Page/Line	Now Reads	Should Read	Reason for Change
17:11	That's my understanding, yes.	That's my understanding to the extent you understand this "case" to mean the action brought by SKAT against ED&F and others in England.	Clarification
19:2-3	reflective on the contracts to sign to that end.	reflected on the contracts designed to that end.	Transcription Error
20:24	sent	set	Transcription Error
21:5-6	ex-div and ex-dividend date	ex-date and ex-dividend date	Correction
23:3	extant period	ex-dividend period	Transcription Error
23:20-21	settlement date, prior settlement date.	settlement date prior to record date.	Transcription Error
25:1-3	That in parts of my report I have used the term cum-ex specifically for the transactions that have those attributes.	In parts of my report I have used the term cum-ex specifically for the transactions that have those attributes, because that is how Mr. Wade uses the term.	Clarification
25:22	No. Everything is in my report.	No. Everything is in my report as concerns Mr. Wade's first report dated December 31, 2021. To the extent there are additional opinions expressed in Mr. Wade's subsequent reports, particularly in his February 28, 2022 report which responded to my February 1, 2022 report, I	Clarification

Page/Line	Now Reads	Should Read	Reason for Change
		may have additional opinions or reactions to those materials.	
29:8-9	I don't have any opinions to add to that, no.	I don't have any written opinions to add to that, no.	Clarification
29:22-23	I haven't been asked to reply to that report, either.	I haven't been asked to produce a written report that replies to that report, either.	Clarification
32:19	engaged him	engaged in	Transcription Error
32:25-33:1	I received references in that reports that Mr. Wade's used, so documents.	I received Mr. Wade's report and the documents that he either cited in his report or listed as having considered.	Clarification
33:3-9	If there was anything else that I didn't receive, which was either in that report at the time that it wasn't passed to me or, indeed, I acquired additional information around questions I had, then I passed them through Binder and K&L Gates to supply that to me.	If there was anything that I didn't receive, including materials that were either referenced in Mr. Wade's report or that I felt would be helpful to answer other questions I had, then I asked Binder and K&L Gates to supply those additional materials to me.	Clarification
33:18, 24	Adam Wall	Adam Piper	Correction
34:2, 34:15	Mr. Wall	Mr. Piper	Correction
34:18	attained	obtained	Transcription Error
35:4	No, only these.	No, only the documents that you sent to me.	Clarification
36:3-4	stop loan	stock loan	Transcription Error
36:18-20	so I haven't been involved with dividend arbitrage directly in my career but from a structuring perspective,	but I haven't been involved with dividend arbitrage directly in my career from a structuring perspective,	Clarification
38:10	Are the reasons	Are there reasons	Transcription Error
40:25-41:1	describes how their investment strategy and decisions was followed and came about	describes how their investment strategy and decisions came about and were followed	Clarification
41:2	you what	you from what	Transcription Error
41:15	the starts of transactions	the types of transactions	Transcription Error
41:21	to market	what market	Transcription Error

Page/Line	Now Reads	Should Read	Reason for Change
56:6	Hayden	Oxford	Transcription Error
64:7	in part of	a part of	Transcription Error
65:9	IFC	DIFC	Transcription Error
66:18	as if	as to whether	Clarification
66:18-20	tact	tactic	Correction
69:19-20	Well, they're very different, so I would say no.	Well, they're very different, so I would say they wouldn't have suffered from the same flaws.	Clarification
69:24	brokering	brokerage	Transcription Error
72:1	2019	2020	Correction
72:8	operation-related	operational-related	Transcription Error
72:21-22	shown in the	discovered	Correction
72:23	cover up their sales	cover their sales	Transcription Error
73:8-9	which was the ones	which were the ones	Transcription Error
74:1	that is that	this is that	Transcription Error
74:2	from accounts	accounts	Correction
74:15	through human hands or operations person	through the human hands of an operations person	Transcription Error
75:5-6	I've seen the reconciliations. Faxes were produced	I've seen the reconciliations that were produced	Transcription Error
80:13-14	moment, and then I corrected myself, but	moment, but	Correction
83:3	what	when	Transcription Error
94:15	the	a	Transcription Error
94:21	paying	dividend paying	Correction
94:22	the party who sold the shares	a party who sold shares	Correction
103:13	calls	pools	Transcription Error
107:23	is	there is	Transcription Error
108:1	it has crossed, it has	it has	Correction
108:3	LSC	LSE	Transcription Error
110:25-111:1	as a party ex-dividend shares, one, I won't	as a counterparty ex-dividend shares from someone else, I won't	Correction
112:11	trade-on-trade date	trade, on the trade date,	Transcription Error
114:1	so;	so,	Transcription Error
114:4	have paid for them	paid for	Clarification
118:14	rights	right	Transcription Error
123:3	it	its	Transcription Error
125:6	purchasing	purchasing pension	Correction
125:17	G	the	Transcription Error

Page/Line	Now Reads	Should Read	Reason for Change
127:17-18	the pension plans that purchased	the pension plans purchased	Clarification
129:11	"However,	"However,"	Transcription Error
129:17	trade date," would	trade date, would	Transcription Error
131:9	EZMA's	ESMA's	Spelling Error
132:21	issuances	issuance	Correction
132:22	subsequent	the consequent	Transcription Error
132:24	actually having	having actually	Correction
133:13 134:12 134:19 165:21 322:18	EZMA's	ESMA's	Spelling Error
133:22-23	"ESMA rights. Those	ESMA writes, "Those	Transcription Error
133:25	transfer, either	transfer (either	Transcription Error
134:1	lending,	lending)	Transcription Error
134:4	paperwork, including tax certificates	the paperwork (including tax certificates)	Transcription Error
134:21-22	it ESMA as read	the ESMA document as read	Correction
135:8	expertise	that expertise	Correction
136:14	that's involved	that includes	Correction
137:17	2019	2020	Correction
138:12	and really understand	and I really need to understand	Transcription Error
155:10	final	fund	Transcription Error
155:11	expectation. There's	expectation there's	Transcription Error
158:10	Dubai	(Dubai)	Transcription Error
158:11	or an	or	Transcription Error
159:3	to the fact	in fact	Correction
159:23	"of sufficient number of shares"	of a sufficient number of shares	Transcription Error
161:23	reflected	reflective	Transcription Error
162:1	So for – effectively	So to effectively	Clarification
162:5	independent dealer-brokers	interdealer-brokers	Transcription Error
165:2-4	That was one paragraph, the context of that. I would need to go through	That was one paragraph. To understand the context of that, I would need to go through	Clarification
168:12	depositions	dispositions	Transcription Error
171:4	do know that what	do not know what	Transcription Error
172:25-173:1	like, "These are my settlements,"	like internalized settlements	Transcription Error

Page/Line	Now Reads	Should Read	Reason for Change
173:6	buying; it	buying that	Transcription Error
176:19	annex dividend	an ex-dividend	Transcription Error
177:8	annex dividend	an ex-dividend	Transcription Error
182:17	trade specifications	specification	Correction
182:25	the	a	Transcription Error
183:4	expressed	express	Transcription Error
183:22	audit	order	Transcription Error
184:9	fellow	fund	Transcription Error
191:9	trade. I	trade, I	Transcription Error
194:4	ED&F the	ED&F, the	Transcription Error
193:21	Gavin	Good afternoon	Transcription Error
198:25	had	add	Transcription Error
199:13	that to ensure the	as to ensure that the	Transcription Error
199:15	effects.”	effect.”	Transcription Error
200:9	above for	on behalf of	Transcription Error
200:11	specialist’s	specialist	Transcription Error
200:23	customer, after which they provided.	customer, which they provided upon conclusion of the transaction.	Clarification
201:7	controlled P&L	P&L	Correction
201:16	confident communication	confidential communications	Transcription Error
205:10	Whitehead	Wade	Transcription Error
207:17-19	I wasn’t aware of how it concluded. I think more than being informed that he was going to a court case in Germany.	I wasn’t aware of how it concluded, I think, more than being informed that he was going through a court case in Germany.	Transcription Error
207:22	note	no	Transcription Error
208:5	reapplies	replies	Transcription Error
208:7	good	looking good	Correction
208:11	Sorry, at the back...	“Sorry about the back...”	Transcription Error
210:6, 19, 21, 25 211:3, 7 213:3, 4 216:6, 13 217:15, 23 218:4 221:9, 16, 25 222:3, 4, 12, 17, 24, 25	Latesha	Lutetia	Spelling Error

Page/Line	Now Reads	Should Read	Reason for Change
223:5, 11, 22 224:9, 16, 24 225:8, 23 234:20 235:18, 21 236:17 237:9, 10, 16, 19, 24, 25 238:2, 6, 7, 18, 25 287:10			
214:23	7071	70, 71	Transcription Error
214:25	an, "ED&F	an ED&F	Transcription Error
215:1	Charlotte Woodward,"	"Charlotte Woodward"	Transcription Error
215:3, 4, 24	Scofield	Schofield	Spelling Error
216:22	151 pound million, 525,000	151,525,000	Clarification
217:18	"Below please confirm trade dates."	"Please confirm below trades."	Correction
219:9	are	are in	Transcription Error
220:9-12	RBC, and again, I would have to check with them directly because I haven't. But you may have done, which	RBC—and again, I would have to check with them directly, because I haven't, but you may have done—which	Transcription Error
225:18	be June	be due	Transcription Error
225:18	is June	is due	Transcription Error
226:2	un-deliver	on-deliver	Transcription Error
228:9	Appendix C, Annex E trades	Appendix C Annex E Trades	Transcription Error
228:9-10	Appendix E/non-Annex E trades,	Appendix C Non-Annex E Trades	Transcription Error
229:1	Osorry	Sorry	Spelling Error
232:23	that, "IDBs	that IDBs	Transcription Error
233:1	nothing."	nothing.	Transcription Error
233:20	appropriate	inappropriate	Transcription Error
234:24-25	Luther Chair	Lutetia	Spelling Error
236:15	"In	in	Transcription Error
237:5-7	So it was ED&F see themselves, Latesha, as their ultimate counter-party,	So ED&F themselves see Lutetia as their ultimate counterparty because they can't see through them to	Clarification


Page/Line	Now Reads	Should Read	Reason for Change
	because they can't see through them.	whomever Lutetia may be acting on behalf of.	
240:7-8	ERISA principle	riskless principal	Transcription Error
244:17	is	are	Clarification
244:20	Oon Oa	on a	Transcription Error
245:8	fine-level rational	financially rational	Transcription Error
247:9-10	council directive 2011 16 EU	Council Directive 2011/16/EU	Transcription Error
251:3	extremely difficult to obtain	extremely difficult	Clarification
252:9-10	Appendix C, Annex E	Appendix C Annex E,	Transcription Error
252:10	Appendix C, non-Annex E	Appendix C Non-Annex E,	Transcription Error
253:20	it	he	Clarification
255:10	isn't a book of business transactions	is a book of business where transactions	Transcription Error
257:17	certainty	certainly	Transcription Error
259:6	others,	"Other,"	Transcription Error
261:14	Page	Trade	Transcription Error
268:14-15	The ex date drops at the time of the market.	The market drops at the time of ex date.	Correction
268:18	exchange is to	exchange	Correction
269:25	holders, 73 percent	holders with 73 percent	Correction
270:25	and	end	Transcription Error
273:4-6	But the consumer being these specialist funds all have – because they're trading in the market,	But the consumer, these specialist funds, are trading in the market,	Clarification
276:10	Euro Clear	Euroclear	Spelling Error
277:13-15	that they internalized settlements, was happening in the books of custodians.	that internalized settlements were happening in the books of custodians.	Clarification
277:17	settlements	settlement	Spelling Error
277:25	can	can't	Transcription Error
279:8	knowing	knows	Correction
279:12	counter-parties	central counter-parties	Correction
280:19	that high-frequency	that if the high-frequency	Transcription Error
284:12	in	within	Transcription Error
284:13	in	on	Transcription Error
284:18	And then	And	Correction
286:1	release of shares	reuse of the shares	Transcription Error
288:12	straight	their	Transcription Error
288:21	is a	the	Transcription Error
289:16	in stock	in and stock	Transcription Error

Page/Line	Now Reads	Should Read	Reason for Change
290:4	settles	settled	Transcription Error
290:12	Adam Wall	Andrew Wall	Correction
290:14-21	But a conversation I would expect to have about a person in settlements that is responsible for a depot and optimizes it would be very well-versed in the devices and functions that would be required for them to meet their target of not having any fails and to not lose too much money to fund that process through the settlement day.	But that's a conversation I would expect to have with a person in settlements—they are responsible for a depot and optimize it, and they would be very well-versed in the devices and functions that would be required for them to meet their target of not having any fails and to not lose too much money to fund that process through the settlement day.	Clarification
291:16	prevailed	prepared	Transcription Error
291:17	is the – effectively	is effectively	Clarification
293:25	electronic	electronic form	Clarification
296:13	an nominee	a nominee	Spelling Error
296:17	we	would	Transcription Error
299:24	remitted	permitted	Transcription Error
300:5	and a	and the	Transcription Error
300:15 314:13	marketing claim	market claim	Transcription Error
301:17	does	do	Transcription Error
301:22	but	and	Clarification
302:5	is achieved settlements	actually settled	Transcription Error
303:13	obtaining a financing loan from them	obtaining financing from them	Clarification
304:15	seeing	showing	Transcription Error
305:7-8	it would not be a need to borrow	there would not be a need to borrow	Transcription Error
312:16-19	So from -- because the client has shorted, if that was the case, then there are the shorting -- they're either shorting, because they don't short it.	So because the client has shorted, ED&F will see that the client is short as they don't have the stock.	Clarification
313:22	if there is shares	if there are shares	Transcription Error
314:8-10	of a client of you and I buying two sets of shares, but not essentially receiving both the ED&F's depots by settlement date,	of you and I buying two sets of shares, but not receiving both sets of shares into ED&F's depots by settlement date,	Clarification

Page/Line	Now Reads	Should Read	Reason for Change
314:18	So despite the fact that the shares	So the fact that the shares	Clarification
314:19	depot sum	depot to sum	Transcription Error
320:3-4	in respect to the record date	with respect to the record date	Correction
320:7	payment distribution	payment and distribution	Clarification
320:14	was that for on or before	was that on or before	Transcription Error
321:17-18	A day after the record date purchases.	A day after the record date generally.	Clarification
322:12-13	starting both cum-ex and cum-cum	starting, "Both Cum/Ex and Cum/Cum"	Transcription Error
322:18	cum-ex case, the	Cum/Ex case the	Transcription Error
323:6	No, I'm not aware of any other.	No, I'm not aware of any that would.	Transcription Error
324:15	the 6th March	the 6th of March	Transcription Error
325:7	of March 2014	in March 2014	Clarification

I declare under penalty of perjury under the laws of the United States of America that I have read the entire transcript of my deposition taken in the above-captioned matter and the same is true and accurate, save and except for changes and/or corrections as indicated by me on the deposition errata sheet hereof, with the understanding that I offer these changes as if still under oath.

Executed this 20 day of May, 2022


Max F. Hayden